

IN RE: INVESTIGATION OF PETER W. HEED



REPORT OF THE DEPUTY ATTORNEY GENERAL

OCTOBER 6, 2004

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I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

A. Introduction

On August 18, 2004, Sullivan County Attorney Marc Hathaway delivered a letter to Attorney General Kelly Ayotte that outlined his concerns about the criminal investigation of Peter Heed. Hathaway provided a detailed chronology of events that occurred during the investigation and he posed eight questions for consideration by the Attorney General. His questions can be categorized into four areas of concern:

1. The role of the Commissioner of the Department of Safety, Richard Flynn, in requesting Heed's resignation during the criminal investigation;
2. Flynn's temporary order to the division of state police to suspend or delay the criminal investigation in the days preceding Heed's resignation;
3. Flynn's disclosure of information obtained from the criminal investigation to Heed, Governor Craig Benson and/or the members of the Executive Council; and
4. Flynn's failure to comply with Hathaway's instructions to prohibit the dissemination of information obtained during the criminal investigation, and to rescind any orders that slowed the investigation.

On August 19, 2004, Heed, through his counsel, wrote to the Attorney General requesting that she appoint an independent counsel to investigate whether Flynn or Benson engaged in any criminal conduct relating to Heed's resignation. Heed identified seven potential criminal violations that he suggested Flynn or Benson may have committed. He also asked the Attorney General to consider whether Flynn or Benson violated the executive branch code of ethics, and whether Flynn should be removed from office under RSA 4:1.

The Attorney General assigned me to conduct an independent review of Hathaway's report and to make recommendations. I elected to conduct further interviews regarding the issues raised. I assigned two veteran investigators to work with me: Senior Investigator Paul Brodeur of the New Hampshire Attorney General's Office and Deputy Chief of Police Richard O'Leary of the Manchester Police Department. Appendix A contains a summary of their experience and qualifications. We conducted additional interviews, including but not limited to interviews of Flynn, Benson, all Executive Council members, Hathaway, Heed, Ayotte, and all state police personnel who participated in the investigation of Heed. We also reviewed all of the investigative materials generated by state police and Hathaway since the onset of the investigation. Appendix B lists all interviews that were conducted.

B. Summary of Findings and Conclusions

The following findings are supported by the facts learned and the reasonable inferences drawn from those facts:

Concern # 1 – Heed's Resignation

- During the time period that Flynn exercised control over the criminal investigation, he should not have met with Heed on behalf of Benson to encourage his resignation. Flynn's direct involvement in a personnel matter while he also supervised a related criminal investigation has undermined the public's confidence in the handling of Heed's resignation and the criminal investigation.
- During his meeting with Heed about resignation, Flynn did not provide any false or inaccurate information to Heed about Heed's alleged behavior at the conference. The general information that Flynn told Heed about his alleged misconduct was consistent with allegations made by Cheryl Reid during her interview. However, Flynn did not provide a full or balanced account of all of the investigative material available. Flynn did not tell Heed about Reid's opinion that Heed did not criminally assault her on the dance floor and he did not discuss the preliminary opinion shared by investigators that no crime had occurred on the dance floor. Flynn was aware of that information before he spoke to Heed about his resignation.
- There is no evidence that Benson attempted to influence the outcome or progress of the criminal investigation in order to obtain Heed's resignation. The presence of legal counsel within Benson's office could have assisted Benson in obtaining professional advice about the advisability of engaging the Commissioner of Safety to carry out Benson's decision to encourage Heed to resign.

Concern # 2 – Delay in the Investigation

- Flynn caused a short-lived suspension or delay of the investigation shortly after he spoke to Heed about his resignation. The delay had negligible impact on the actual progress or outcome of the investigation. The division of state police never ceased active investigative efforts in accordance with Flynn's directive, except for the one day when Heed resigned. Flynn refused to resume investigative efforts at Hathaway's request, but he did resume investigative efforts at Ayotte's request.
- Flynn has explained that he attempted to curtail investigative efforts based on budgetary considerations because the preliminary interview of Reid indicated that Heed did not commit a crime, and initially, he was concerned about weekend overtime pay. The Colonel of the New Hampshire State Police, Frederick Booth, confirmed that Flynn had expressed these concerns about resource expenditures. However, Flynn's explanation is called into question by the following information: (1) only one person - the complainant Reid - had been interviewed when Flynn made efforts to curtail investigative efforts; (2) Heed alleged that Flynn offered to slow

down the investigation while he considered resigning, which allegation Flynn denied; (3) when Hathaway asked Flynn to resume the investigation, Flynn cited not only his belief that no crime had occurred, but also Heed's impending resignation and the adverse impact of further investigation on Heed and the Attorney General's Office; (4) when Ayotte interceded, Flynn expressed concern for the reputation of the Attorney General's Office and Heed; (5) the timing of Flynn's issuance and later rescission of instructions suspending the investigation coincided closely with the timing of the initial solicitation and ultimate submission of Heed's resignation, respectively; and (6) the division of state police completed in excess of 50 interviews after the investigation resumed, which objectively contradicted the existence of any budgetary concerns in continuing the investigation. In short, it is reasonable to infer that Flynn's explanation for the brief suspension of the investigation is not credible in light of these circumstances.

- There is no evidence that Benson directed or attempted to influence Flynn to temporarily suspend investigative efforts, nor does any evidence suggest that Benson had knowledge of Flynn's temporary order or the brief delay in the criminal investigation.
- Before the Executive Council voted to accept Heed's resignation, Hathaway had advised Heed and his legal counsel about the temporary suspension of the investigation and about his other concerns with the investigative process. Heed also learned that the criminal investigation was likely to exonerate him of criminal wrongdoing. Heed requested the Executive Council to table consideration of his resignation, but he also made a voluntary decision not to withdraw his letter of resignation. Heed did not notify the Executive Council of any concerns with the investigative process prior to their vote accepting the letter of resignation.

Concern # 3 – Disclosure of Information Obtained From the Criminal Investigation

- During the criminal investigation, Flynn should have avoided any meeting with Heed, the target of the investigation, which required him to disclose general information to Heed about his alleged misconduct at the conference, regardless of whether that information was available from other sources.
- As the "supreme executive magistrate" of the State under the New Hampshire Constitution, Benson was entitled to speak to Flynn about the ongoing criminal investigation, particularly where it involved the Attorney General. At the same time, the Attorney General holds statutory authority to control and supervise criminal investigations as deemed appropriate, which authority had been delegated to Hathaway for this investigation. Flynn should have told Benson about Hathaway's particular concerns regarding the dissemination of information to Benson during this investigation. Likewise, Hathaway, who was acting with the full statutory authority of the Attorney General over this investigation, should have contacted Benson directly to raise his concerns and discuss appropriate limitations on the dissemination of information to Benson. Nobody contacted Benson about these concerns.

- After the Executive Council meeting at which Heed's resignation was accepted, Benson received a 20-page internal memorandum from Flynn that summarized interviews from the criminal investigation, but Benson did not read the memorandum upon receipt. None of the Executive Council members had been provided with a copy of that memorandum, nor did they have substantive discussions about the status of the criminal investigation with Flynn prior to their vote accepting Heed's resignation. Flynn did not influence any of their votes.

Concern # 4 – Disregard For Hathaway's Authority

- Flynn disregarded specific instructions by Hathaway during the criminal investigation. By delegation of statutory authority from Ayotte, Hathaway served as the chief law enforcement officer for the State supervising the investigation, and Flynn should have understood and respected that authority.
- The New Hampshire State Police completed a professional, thorough and impartial investigation of Heed, and they capably neutralized outside influences that were inevitable in such a high-profile investigation. They also demonstrated proper regard for Hathaway's supervisory role over the investigation.

Other Findings

- The Department of Health and Human Services exercised sound judgment and proper concern for the welfare of its employees by notifying the Department of Justice about the initial allegations of misconduct against Heed. Commissioner John Stephen did not influence or have any advance knowledge of the initial decision made by the supervisors at DCYF to contact the Department of Justice about the allegations. There is no evidence that Commissioner Stephen played any role in seeking Heed's resignation.
- DCYF employees had raised genuine concerns to their supervisor in private about the conduct of a high-ranking executive branch official. The State of New Hampshire must seriously address the potential chilling effect caused by the widespread public disclosure of their names and personal information against their wishes, where no criminal prosecution occurred.

C. Summary of Recommendations

- There is no evidence that Benson violated criminal laws during the investigation of Heed. There is insufficient evidence that Flynn violated criminal laws during the investigation of Heed. I do not recommend any criminal prosecution.
- I do not recommend that the Attorney General file a petition seeking Flynn's removal from office under RSA 4:1. The irregularities identified above that can be attributed to Flynn are mitigated by several factors, including: (1) Flynn was acting at Benson's request when he encouraged Heed to resign; (2) the actual delay in the investigation was minimal; (3) the outcome of the investigation was not affected; (4) Flynn complied with Ayotte's instructions to resume the investigation; and (5) this investigation presented extraordinary and unprecedented circumstances.
- I recommend that the Governor and Council consider formal discipline of Flynn

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II. FACTUAL SUMMARY OF THE INVESTIGATION

A. The Initial Complaint

On May 20-21, 2004, the Department of Justice (DOJ) sponsored the 10th Annual Statewide Conference on Domestic and Sexual Violence at the Mount Washington Hotel. After the conference, Mary Thayer, a DOJ administrative assistant who organizes the conference, complained to Lori Weaver at the Division for Children, Youth and Families (DCYF) about the conduct of Donna Parisi Meuse at the conference. Parisi Meuse, a DCYF case worker, had been rude to hotel staff. On May 26th, Parisi Meuse's supervisor, Dawn Brown, disciplined Parisi Meuse for her rudeness. Parisi Meuse had attended the conference with another DCYF employee, Cheryl Reid. Parisi Meuse was upset that her supervisor had reprimanded her, and she spoke to Reid about it. Both Parisi Meuse and Reid suspected that DOJ staff had orchestrated Parisi Meuse's discipline as retaliation because Parisi Meuse had taken photographs of the Attorney General dancing at the conference.

On Friday, June 4th, Reid spoke to Parisi Meuse's supervisor, Dawn Brown, to defend Parisi Meuse. Reid told her supervisor that DOJ employees also acted inappropriately at the conference. As an example, Reid advised her supervisor that the Attorney General had touched her inappropriately on the dance floor. Reid explained that the Attorney General had come up behind her and grabbed her hips. Reid also stated that she thought she felt someone touch her breast, but she had a padded bra on and could not be sure. According to Reid, her boyfriend told the Attorney General to get his hands off of his girlfriend, but Reid "hushed up" her boyfriend once she realized that it was the Attorney General who had touched her from behind. Reid told Brown that she did not want to cause any trouble, and Reid noted that she would have to deal with the Attorney General for an internship in order to obtain her Master's degree. Brown advised Reid that the information had to be reported to more senior DCYF administrators.

On Monday, June 7th, Maggie Bishop, DCYF's Child Protection Administrator, notified the Director of DCYF, Nancy Rollins, about the complaint. They sought the advice of DCYF legal counsel, Byry Kennedy, and then contacted Associate Attorney General Ann Larney at DOJ. Larney regularly provides legal advice to DCYF on behalf of the DOJ. Larney notified Ayotte about the complaint. Attorney Larney also requested more specifics from DCYF about the allegation of inappropriate touching. In response, Maggie Bishop contacted Reid on Tuesday, June 8th. According to Bishop, Reid told her that the Attorney General "had his hands on her waist and proceeded to move up to her breast." Reid stated that she pulled away, and her boyfriend intervened and told the Attorney General to "keep his hands off his girlfriend." Reid also told Bishop that there were pictures taken and that "he" was completely inappropriate, intoxicated and had stripped off his shirt on the dance floor, swinging his shirt over his head. Reid also stated that a worker in DCYF's Keene office had a worse experience at a previous conference a few months earlier.

Commissioner John Stephen of the Department of Health and Human Services (DHHS) was out of the office when DCYF Director Rollins learned about the complaint. Director Rollins was unable to reach Stephen before contacting DOJ. He had no participation in or knowledge of the initial report by Director Rollins to the DOJ. Upon learning of the complaint, Stephen directed his staff to ensure that Reid and Parisi Meuse received support and assistance.

B. The Commencement of the Criminal Investigation

On Tuesday, June 8th, Ayotte contacted Hathaway and requested him to supervise a criminal investigation by the state police into the complaint. Hathaway recalled that Ayotte told him that there were two versions of the complaint - one involved touching the breasts of a woman on a dance floor, and one that involved inappropriate touching on a dance floor without touching of the breasts. They agreed that Ayotte would notify Heed about the investigation and provide him with general information about the nature of the complaint. In the early morning of Wednesday, June 9th, Ayotte contacted New Hampshire State Police Colonel Frederick Booth to request that state police handle the criminal investigation. Booth is the highest ranking officer in the division of state police. Typically, DOJ investigators would conduct any criminal investigation of a high-level executive branch official. However, DOJ investigators were not used in this case because DOJ investigators fell under the executive direction of the Attorney General, who was under investigation.

Booth assigned Major Barry Hunter, a senior ranking member of the state police and the commander of the Special Investigations Bureau, to oversee the investigation. Booth assigned Lieutenant David Kelley to lead the investigation. According to Lt. Kelley, Booth and Hunter made it clear to him that Hathaway was in charge of the investigation, that Hathaway had the full authority of the Attorney General's Office, and that Lt. Kelley was answerable to Hathaway. Booth also notified Flynn about the complaint and the request for an investigation by state police. Hunter personally visited Hathaway on Wednesday, June 9th to discuss Hunter's role as liaison for state police. Hathaway stated that Hunter told him that the case would be given the highest priority, and they shared a desire to proceed with "all deliberate speed."

C. Notification to Heed and Benson

On June 9th, Ayotte notified Heed of the complaint, upon his return from an annual meeting of the Association of Police Chiefs at the Balsams. According to Ayotte, she told Heed that Attorney Lamey had received a complaint from DHHS regarding his potential misconduct on the dance floor. She described the allegation as follows: that he grabbed a woman by the waist or hip area and moved his hands up towards her breasts, after which the woman pulled away, and the woman's boyfriend intervened and told Heed to get away from his girlfriend. Ayotte stated that Heed was very upset upon hearing the allegation and told Ayotte that he did not do anything wrong at the conference. Heed had a similar recollection of this conversation. He recalled that Ayotte told him the allegation involved either having touched a woman's breast or having

attempted to touch a woman's breast, after which the woman had pulled away from him, and that it was witnessed by a boyfriend. Heed stated that he was decimated by the allegation, and while he knew that he had not done anything like that, he treated the allegation as very serious.

Heed walked across the street to Benson's office and advised him of the investigation. Benson estimated that they met for 15 to 20 minutes in Benson's conference room. According to Benson, Heed described the allegation and stated that he did not recall what had happened and did not recall having done anything wrong. Benson received the impression that Heed did not believe that his conduct was criminal, but they had no specific discussion about whether the conduct might be criminal. According to Heed, he denied the allegation and Benson was very supportive. Heed was the first person to notify Benson about the complaint. However, earlier that week, Benson had attended the annual meeting of the Association of Police Chiefs at the Balsams, where he had heard anecdotal stories about Heed's "bad behavior" at conferences.

After their meeting, Benson and Heed walked back to the Attorney General's office together, where Benson met alone with Ayotte. Although Benson could not recall what specific information he received from Ayotte, he generally remembered that Ayotte described the allegations in greater detail than Heed. Ayotte recalled that she told Benson the basic allegations and explained why she had referred the matter to Hathaway. She perceived Benson as being surprised about the allegation but very understanding, and she recalled Benson referencing Heed's outgoing personality and how it could be misinterpreted. According to Hathaway, Ayotte later briefed him on her meeting with the Governor, and she advised Hathaway that she had provided Benson with a more detailed briefing than she had provided to Heed.

D. The Interviews of Reid and The Internal Memorandum

On Wednesday afternoon, June 9th, Lt. Kelley interviewed Reid by telephone and scheduled a formal interview on the next day. During the phone call, Reid stated that she felt that the situation was "spinning out of control." She indicated that her dance floor encounter with Heed lasted "two seconds." Heed grabbed her by the hips from behind and moved upward towards her ribcage, but he did not touch her breasts, and Heed had "definitely not" sexually assaulted her on the dance floor. Reid described how she had pulled away and identified Heed when she turned around. Her boyfriend intervened on her behalf and uttered words to the effect "What are you doing, copping a feel with my girlfriend?" Reid indicated that she had told her DCYF supervisors that she did not want to get anyone in trouble and that it was not her intent to make a complaint.

Reid also provided Lt. Kelley with a very unflattering depiction of Heed's conduct at this conference and a prior conference, including that: he was acting like an idiot; Heed was "dirty dancing" and "out of control" in the bar; he took his shirt off and was left wearing a black T-shirt and began swinging his shirt over his head; he had "fondled" a female domestic violence worker named Gina from Keene at a prior

conference. She opined that Parisi Meuse's discipline was a vendetta by the Attorney General's office for taking pictures of Heed dancing.¹

After the phone call, Lt. Kelley provided a very short briefing of the phone interview to Flynn and Booth at headquarters. Lt. Kelley offered his preliminary opinion that "it doesn't look like this is really a crime." Booth had a similar recollection of the conversation. Flynn remembered that Lt. Kelley gave him the impression that "she did not want to go forward" and "there was no crime."

Lt. Kelley could not recall whether he briefed Flynn and Booth on Reid's allegations about Heed's other inappropriate conduct at the conference, but he acknowledged that it was a possibility. Booth believed that other topics were discussed, but he could not recall in detail what Lt. Kelley had said about those topics. Flynn remembered hearing most of those rumors even before the investigation commenced, although he could not recall the source of that information. Flynn could not recall if he first learned about the woman from Keene during this initial debrief. Flynn was not sure whether he spoke to Benson after this initial debrief or on the next day, although according to Hathaway, Flynn told Hathaway that he contacted Benson after this initial debrief. Benson could not pinpoint the specific date of his first discussion with Flynn.

On the next morning, Thursday, June 10th, Lts. Kelley and Susan Forey completed a formal, recorded, 2 ½ -hour interview of Reid. Lt. Kelley spent the afternoon coordinating investigative efforts with Hathaway. Booth received an update from Lt. Kelley in the afternoon. According to Booth, Lt. Kelley advised him that Reid had reiterated the same information as before, and Booth made contact with Flynn to provide him with that information. Flynn asked if Lt. Kelley could draft a memo outlining what Ms. Reid had said. Booth also remembered that Flynn told him at some point late that afternoon that Benson had asked Flynn "to go talk to Peter Heed." Booth stated that Flynn was "sick about it," and it was clear to Booth that "it bothered Commissioner Flynn a great deal." Flynn did not specifically reference Heed's resignation, but Booth inferred that resignation was the likely topic of conversation.

Flynn did not remember meeting with Booth on Thursday afternoon. He had no recollection of requesting a memo, but he indicated that he could have made such a request. According to Benson and Flynn, Benson never asked Flynn to prepare a memo of Reid's interview.

Flynn stated that he spoke to Benson on Thursday, at which time Benson asked him to talk to Heed about resigning from office. Benson also remembered a conversation

¹ Throughout this report, there are references to allegations made against Peter Heed. The report contains accurate descriptions of the allegations made by the witnesses. It is beyond the scope of this report to review each allegation and draw conclusions about which allegations were substantiated or unsubstantiated by the investigation. Many of the allegations were dismissed as a result of the investigation. For example, the allegation that Peter Heed fondled a woman named Gina from Keene was disproved, and the allegation of a vendetta by the Attorney General's Office was disproved. Other allegations raised differences of opinion or observation by those in attendance. Please refer to Marc Hathaway's report dated July 12, 2004 and the state police investigative file for a complete review of the evidence regarding each allegation.

taking place, but it was his recollection that Flynn proposed the idea of resignation. Benson recalled that he initiated the phone call between Benson and Flynn. In any event, Benson and Flynn both agreed that Heed should be encouraged to resign. Although Benson could not recall what specific information Flynn provided to him, Benson stated that Flynn did not tell him anything different from the information he had already received.

With respect to approaching Heed, Flynn indicated that he was reluctant to approach Heed about resigning because he liked Heed. He felt that it would be best for Heed and his family if he left office.

In the early evening on June 10th, Booth stopped by the Investigative Services Bureau and met with Lt. Kelley. Lt. Kelley stated that Booth requested that he generate an email summarizing the Reid interview as quickly as possible. Booth stated that he proposed a written summary by email so that Lt. Kelley could generate the document at home that night, rather than staying at work late. Lt. Kelley did not believe that an email was the appropriate format for a written summary, so he proposed to generate a hard copy document, which he entitled "Internal Memorandum." Although it was not routine for Lt. Kelley to generate an internal, post-interview summary, Lt. Kelley stated that this request was not "out of the ordinary" for a high level or newsworthy investigation that might impact the Department of Safety in some manner. Booth also characterized this request as occasional, but not unusual. Booth requested that Lt. Kelley leave copies of the memorandum for him and Flynn, and Lt. Kelley advised Booth that he would complete the document that night.

Lt. Kelley promptly notified Hathaway about the request for a written summary of the Reid interview. Hathaway expressed his reservations to Lt. Kelley about the memorandum because it was outside the scope of the formal police reports that would be generated in the case, and he wanted to maintain a "tight case." Although Hathaway instructed Lt. Kelley to complete the memorandum as requested, from Lt. Kelley's perspective, Hathaway was "quite insistent" on putting a note at the bottom of the internal memorandum indicating that it was confidential and should not be distributed outside of the Department of Safety.

According to Hathaway, Lt. Kelley advised him that he had been ordered to prepare an internal memorandum for the Commissioner. Hathaway viewed the request as "highly unusual" in his experience, but he also recognized that this was not a normal case. Hathaway wanted to make it "absolutely clear that everybody in the investigation understood his expectations with respect to confidentiality," so he instructed Lt. Kelley to insert the confidentiality note at the bottom of the memorandum. Hathaway did not contact Hunter, Booth or Flynn to discuss the confidentiality note, and he did not request that Lt. Kelley do so. Rather, he felt that the confidentiality note would be "self-executing" and would come to the attention of Lt. Kelley's superiors in the normal course of reading the memorandum. Nobody discussed or considered putting the confidentiality note at the top of the memo, rather than at the bottom.

Lt. Kelley remained at work that night, and he completed the Internal Memorandum at 11:53 p.m. On the final page of the 7-page memo, Lt. Kelley included the confidentiality note in bold per Hathaway's instructions. He left a copy of the memo on Flynn's chair and on Booth's desk.

Lt. Kelley's internal memorandum was a comprehensive summary of Reid's recorded interview. The memorandum contained facts very similar to the information provided by Reid during her initial phone interview, which was favorable to Heed with respect to criminal liability. The memorandum also outlined some additional rumors about Heed's conduct at the conference that Reid had not discussed during her phone interview, including that: someone had to call security because Heed had knocked on a door and yelled that he was the police; Heed and several friends had pulled a cartload of beer down the hotel corridor around the same time; Heed had engaged in a "simulated striptease" as he removed his button down shirt on the dance floor; and Heed had been walking around the conference in a "Speedo bathing suit."

E. The Request for Heed's Resignation

Early the next morning, on Friday, June 11th, Flynn and Booth received copies of Lt. Kelley's memo when they arrived at work. As part of Booth's daily routine upon arrival at work, he stopped by Flynn's office, and Flynn was just hanging up the phone. They spoke briefly about Lt. Kelley's memorandum. Booth had not yet read the document. Flynn told Booth that it had been a busy morning and Flynn likewise had not yet had a chance to read it. Booth observed Lt. Kelley's memo on Flynn's desk, and he noticed that the top page of the memo had been flipped over with the second page facing up. It did not appear to Booth that Flynn had completed reading most of the document. According to Booth, Flynn again discussed Benson's request for him to talk to Heed. Flynn asked rhetorically why he was tasked with that responsibility. Booth sensed that Flynn remained very troubled, but Booth did not offer any advice because he did not want to step between Flynn and Benson.

Flynn acknowledged that he spoke to Booth each morning about the investigation, but he could not recall their specific discussions on Friday. Flynn stated that he did not read the entire memorandum, but he remembered receiving it. He glanced at one or two pages on Friday morning, but he did not read the memorandum until Sunday or Monday, and he did not notice the confidentiality note at that time. However, Flynn told Hathaway that he had read the confidentiality note on Sunday or Monday. Neither Flynn nor Booth distributed this memorandum to anyone outside of the Department of Safety. Benson did not receive a copy of the memorandum. Flynn also stated that he never revealed any information in the document to Benson. He indicated that he may have provided Benson with information similar to what was written in the memo, but the information given to Benson was based on rumors and street talk.

At approximately 9:00 a.m. on Friday, Flynn and Booth met with Commissioner Stephen and DHHS Attorney Mary Castelli in Flynn's office. According to Stephen, Flynn had scheduled the meeting a day or two beforehand. Stephen had assigned Castelli

to serve as the liaison between DHHS and the state police for any requests made during the investigation. At the meeting, Castelli provided Flynn with a photocopy of the pictures taken with Parisi Meuse's camera of Heed dancing at the conference. According to Stephen and Castelli, Flynn did not discuss Heed's resignation with Stephen or Castelli. Although Flynn remembered meeting with Stephen and Castelli briefly, he did not recall their discussions, nor did he recall receiving any photographs during the meeting.

That Friday morning, Heed was traveling on Route 4 East with his son heading to Portsmouth for a Law Enforcement Special Olympics torch run. Flynn called Heed on his cell phone and told Heed that he wanted to talk to him and Heed should know what it was about. Heed proposed that they meet on Monday in light of the torch run, but later called Flynn back and proposed to reorganize his schedule if it was important. Flynn stated it was important. Heed offered to come back to Concord, and Flynn agreed to meet at a half-way point at Johnson's Dairy Bar on Route 4 in Northwood. Flynn estimated that they met at Johnson's Dairy Bar around 10:00 a.m.

Heed described their meeting as follows: Flynn arrived and stated "Don't shoot the messenger." Flynn stated that he was very upset about talking to Heed, but Heed had become a liability to the Governor and the Governor wanted him to resign. Flynn chastised him for being in a bar with law enforcement. Heed told Flynn that the complaint was false and he was sure that it would be proven false. In response, Flynn stated that reports had come across his desk indicating that: Heed tried to grab this woman; witnesses and photographs existed; DOJ staff allegedly tried to cover up these photographs; Heed allegedly took his shirt off and was swinging his shirt in the air; Heed was allegedly in the hallway either intoxicated or acting intoxicated, speaking loudly or yelling; Heed allegedly was knocking on a door; Heed allegedly had a wild party in his room and that either he or some people from his office were pulling a beer cooler down the hallway; and that other women, including a woman from Keene, were now claiming that he had done something similar to them. Flynn mentioned "Ms. Reid" several times, and Heed began to wonder if the complainant might be Lt. Susan Forey f/k/a Susan Reid, or perhaps the wife of Deputy Rockingham County Attorney, Tom Reid.

Heed responded that "this is crazy" and "how can this be?" Flynn responded that "you can't win this. . .there's no way you can win this - you're the Attorney General." Heed stated that he was stunned by the information and he did not ask any follow-up questions about the investigation. Heed also stated that Flynn provided no information of a mitigating nature.

According to Heed, Flynn said "I feel real bad about this" and "life's not fair, this is just unfair." Flynn then stated that "the investigation did not have to continue if [Heed] resigned." Heed asked what his resignation had to do with the investigation, to which Flynn responded "the pressure would be off." Flynn then stated "Maybe I can slow things down and give you some time to make the decision, but it's important, you [have to] make it quick."

Flynn recalled their meeting as follows: Heed was standing outside of his car talking on his cell phone when he arrived at Johnson's Dairy Bar. When Heed finished his phone call, Flynn told Heed "don't shoot the messenger, I'm just here passing a message." Flynn told him "I've seen the notes" and then "gave him hell about his actions." He recalled that Heed kept pacing back and forth and kept repeating "what did I do?" "what did I do?" "I didn't remember doing anything." Flynn responded by saying that "the talk is all over about you" and "you're making an ass of yourself - you're the Attorney General." Flynn told him that the "Governor thinks you [should consider] stepping down." In response, Heed asked "Well, if I did, you know, will this thing go away?" Flynn responded that he could not promise him that. Flynn denied that he ever suggested that he could stop or slow down the investigation. Heed then asked Flynn for his opinion on what he should do. Flynn responded that he did not know what Heed did, or what he did not do, since Flynn did not attend the conference, but there were all kinds of rumors about what took place. Heed expressed an interest in speaking to Benson, and Flynn recommended that he do that. Heed also stated that he wanted to speak with his wife. Flynn did not believe that he spoke to Heed about Reid's opinion that she was not criminally assaulted. Flynn estimated that the conversation lasted ten minutes.

F. Temporary Suspension of Investigation

In the early afternoon on Friday, after returning from Johnson's Dairy Bar, Flynn spoke to Booth. According to Booth, Flynn raised concerns about overtime on the weekend and asked Booth how far he thought the investigation should go in the absence of any apparent criminal wrongdoing and the complainant's wish not to bring charges. Booth told Flynn not to worry about overtime on the weekend because, based on his discussions with Hunter, Booth believed that Lt. Kelley was not working that weekend. Booth and Flynn did not discuss Heed's potential resignation or the Johnson's Dairy Bar meeting.

Flynn recalled that he initiated discussions about resource expenditures because he was concerned about Lt. Kelley spending too much time on an investigation that was not criminal. Flynn stated that it can be difficult to set priorities when dealing with criminal investigations, but Lt. Kelley was also the Troop A barracks commander and had other responsibilities. Flynn indicated that he was concerned about wasting time and resources when there did not appear to be any crime, and where the complainant did not wish to go forward.

In retrospect, Booth acknowledged that this discussion was the first time that Flynn had raised any concerns to Booth about the allocation of resources to the investigation. Booth, however, strongly disagreed with any characterization that Flynn had stopped or halted the investigation on Friday. Rather, in Booth's opinion, Flynn questioned the use of resources over the weekend and queried "how far do we go with this thing" because Flynn felt there was no criminal wrongdoing based on the existing information. Flynn never suggested to Booth that he wanted the investigation slowed down because of Heed's potential resignation or out of concern for Heed.

Booth did not contact Lt. Kelley after his discussion with Flynn because he did not believe that Lt. Kelley was scheduled to work over the weekend. Unbeknownst to Booth, Lt. Kelley continued to work full-time on the investigation over the weekend given its significance. On Saturday, June 12th, Lt. Kelley concentrated his efforts on identifying and locating the alleged second complainant - the woman named Gina from Keene - and other key witnesses that Reid had discussed during her interview. On Sunday, June 13th, Lt. Kelley interviewed Gina in Keene, and she denied that Heed ever had treated her inappropriately. Also on Sunday, Lt. Kelley began efforts to contact other witnesses from the Keene area that Gina had identified as sources of information about Heed's inappropriate conduct at prior conferences.

When Lt. Kelley arrived home on Sunday evening, he called Booth to update him regarding his progress. Booth was pleased with Lt. Kelley's progress, but he was shocked because he had already told Flynn that Lt. Kelley would not be working overtime on the weekend. Lt. Kelley told Booth that he intended to return to Keene on Monday, June 14th to complete more interviews. In response, according to Lt. Kelley, Booth stated "why don't you hold off on going to Keene. . .until you get further direction from me." Lt. Kelley recalled that Booth may have said something to the effect of "something's happening," without elaboration, but Lt. Kelley did not believe that it was his place to question Booth's instructions or to ask for further explanation. Lt. Kelley told Booth that he would go to his office at Troop A barracks on Monday, instead of going to Keene, and that he would await further instructions from Booth. When the conversation ended, Lt. Kelley believed that he would not be doing any additional investigation without further direction from Booth. Lt. Kelley stated that he did not have to cancel any previously scheduled interviews.

According to Booth, he told Lt. Kelley that he had concerns about the reach of the investigation towards peripheral witnesses and that Flynn had concerns about resources. He asked Lt. Kelley to "hold off on going over to Keene until I can talk to [Flynn] further about it."

Lt. Kelley contacted Hathaway at his home to advise him that he would not be returning to Keene on Monday. According to Lt. Kelley, he told Hathaway something to the effect of "I've been shut down." In retrospect, Lt. Kelley regretted his choice of words because Booth never told him "you're shut down" or "the investigation is shut down." Rather, Booth told him to "hold off on going to Keene" until further orders. Lt. Kelley did not believe that the investigation had been shut down, and he attributed his use of the word "shut down" to his frustration level because he had been working so hard over the weekend to advance the investigation. Lt. Kelley stated that Hathaway was not happy about this development and expressed concern that he was in charge of the investigation and nobody had consulted with him.

Hathaway recalled that Lt. Kelley told him during this phone call that "the investigation had been ordered shut down." Hathaway characterized any disagreement with use of the word "shut down" as a "nuance" placed on what he had been told, but Hathaway made it clear that he fully accepted Lt. Kelley's explanation of what

information was actually conveyed to Lt. Kelley by Booth. From Hathaway's perspective, the investigation was becoming politicized, and the shut down was not professionally reasonable or driven by legitimate law enforcement concerns. Hathaway recognized that they had not yet interviewed Heed or other potential witnesses who had been on the dance floor. Nor had any investigation been completed regarding allegations that the Attorney General's Office had retaliated against Parisi Meuse for taking photographs. Hathaway advised Lt. Kelley to follow his orders, stating "this is not your fight" and said that he intended to address the matter with Lt. Kelley's superiors.

Hathaway immediately contacted Hunter at his home. Hathaway stated that Hunter expressed surprise about the shut down. Hunter recalled that Hathaway's concerns were very heightened during the phone call, that Hathaway was at a loss as to why the investigation had been stopped and he was seeking an explanation. Hunter told Hathaway that he would address the matter at work in the morning.

On the next day, Monday, June 14th, Booth spoke to Flynn between 7:00 - 7:30 a.m. He advised Flynn that Lt. Kelley had worked over the weekend and had interviewed Gina in Keene. Booth told Flynn that Gina had denied that Heed had groped her at a prior conference, but Gina had identified another woman who might have information about something else that happened at another conference. Flynn again questioned how far the investigation should go. Booth responded by recommending that state police complete interviews of at least the principle witnesses regarding the dance floor complaint. Flynn told Booth that he was not convinced because he did not believe that criminal wrongdoing had occurred.

At approximately 8:30 a.m., Booth voiced concerns to Hunter that Lt. Kelley had worked over the weekend, after Booth had indicated to Flynn on Friday that Lt. Kelley would not work overtime. According to Booth, Hunter explained that plans had changed late on Friday, and Hunter had neglected to notify Booth. Hunter later stated that he had no memory of authorizing weekend overtime, but he felt that overtime hours would be expected given the magnitude of the investigation. According to Hunter, he discussed Hathaway's concerns with Booth on Monday morning and learned from Booth that the investigation had come to some sort of stoppage. Hunter expressed his concern that an investigation of this magnitude should continue with "the same enthusiasm with which it had begun just a matter of days earlier." Hunter had no recollection of whether Booth provided a reason or explanation for the interruption.

Later in the day, at the beginning of a 1:00 p.m. staff meeting, Hunter had a follow-up discussion with Booth. Hunter learned that nothing had changed, and the investigation was still on hold. Hunter could not recall the specifics of his second conversation with Booth, but he described the discussion as short, during which Booth conveyed the message that there had been no change in plans. Hunter did not receive any explanation for the investigative delay from Booth, and he did not believe it was appropriate to ask his boss a lot of questions. Hunter had no recollection of Booth having discussed concerns about the allocation of resources to the investigation, and Hunter felt that he would have remembered if it had anything to do with resources. After the staff

meeting, Hunter called Hathaway and recommended that he contact Booth directly, as Hunter was scheduled to travel out-of-state the next day.

Hathaway then contacted Booth on Monday afternoon. According to Booth, he indicated to Hathaway that he wanted to finish interviews of the principle witnesses, but he questioned the need to complete interviews of peripheral witnesses. When Booth described Flynn's position to the contrary, Hathaway asked if he could speak to Flynn in person, and Booth responded affirmatively. Booth notified Flynn that Hathaway planned to contact him. According to Hathaway, Booth told him that Flynn's order remained in effect and that Booth did not know what to say except that those were Flynn's orders. Hathaway was mindful of the fact that Booth had not made this decision, so Hathaway told Booth that he would take the matter up with Flynn.

In fact, Lt. Kelley did not cease investigative efforts on Monday. From Troop A, he conducted four telephonic interviews and reviewed his notes of witness interviews. Lt. Kelley interviewed Reid's boyfriend who was at the conference in May, but who had since returned to Alaska. Lt. Kelley also interviewed Donna Collins and Peter Seavey. They had socialized with Reid near the dance floor at The Cave Bar at the conference. Lt. Kelley would have preferred to interview them in person, but he stated that they were very forthcoming on the phone, and Lt. Kelley did not believe that the information they provided was adversely impacted by phone contact, with one caveat. Lt. Kelley acknowledged that Peter Seavey admitted to using Parisi Meuse's camera at the conference to take photographs of Heed while he danced, and Lt. Kelley could not use those photographs during Seavey's telephonic interview for identification and discussion. Lt. Kelley also conducted an interview of a fourth witness from Keene, Colleen Duquette, who allegedly had information about Heed's prior misconduct at an earlier conference. Duquette spoke freely to Lt. Kelley on the phone and denied having any information about prior misconduct.

On Tuesday, June 15th, no investigative activities took place. Early that morning, Hathaway visited Flynn at his office to discuss the cessation of investigative efforts. Hathaway described the conversation as polite and collegial. When Hathaway addressed the shut down of the investigation, Flynn advised Hathaway about his meeting with Heed regarding resignation. Hathaway expressed concern about that meeting, and Flynn explained that he only spoke to Heed in generalities. During their conversation, Flynn also mentioned that he did not think a crime had occurred. Hathaway explained that the final charging decision was for Hathaway to make, not Flynn. Hathaway also discussed additional witnesses who needed to be interviewed, at which point Flynn began discussing the future of Heed. Hathaway recalled that Flynn commented that the investigation would not be good for Heed if it went forward, that it "was just [going] to get worse," and that "[Heed] can really do well if this could die quietly." Flynn also observed that the Attorney General's Office had been a "shining light" for New Hampshire, as it never had scandals. Flynn recommended to Hathaway that he should "let it go" for the good of the office. Based on these comments, Hathaway did not believe that Flynn necessarily was seeking to harm Heed or to help him, but rather, Hathaway believed, that "a political judgment had been made with respect to Heed as an

asset or a liability to government.” Hathaway described Flynn’s attitude as “this is a done deal – let’s move on.”

Flynn ended the conversation by stating that he would not do anything until he spoke to then-acting Attorney General Ayotte. Hathaway reminded Flynn that he was acting with the full authority of the Attorney General’s Office, and that Ayotte had conflicted herself out of the case. When Flynn stated that he would require direction from Ayotte, Hathaway “did not take it to be an indication that [Flynn] thought I didn’t have the authority – just that [Flynn] wasn’t recognizing it.”

Booth joined them during the final minutes of the meeting. Booth expressed his opinion that at least the principle witnesses needed to be interviewed, but Flynn disagreed. Hathaway stated that Booth was very forthright in stating his opinion that some additional investigation needed to be done. Booth and Hathaway spoke briefly after the meeting, and Booth stated that he told Hathaway to give him an opportunity to discuss the matter further with Flynn.

G. Ongoing Discussions About Resignation

Unbeknownst to Hathaway or the division of state police, ongoing discussions about Heed’s potential resignation had been taking place between Friday, June 11th and Tuesday, June 15th. Flynn stated that Heed called him on either Saturday or Sunday, and they had a discussion lasting a minute or two. According to Flynn, Heed stated “I only wish I knew what had taken place,” and Flynn responded “I don’t know, I wasn’t there.”

Benson called Heed on Sunday morning. According to Heed, Benson was very apologetic, but told him that he was very concerned about the accusations of his bad behavior at the conference. Benson told Heed that Heed could not win and he discussed the political implications of rumors about other women. Benson encouraged Heed to resign. He mentioned that it would be over quickly or over in a week, but Benson did not express any indication that the investigation could be or had been slowed down.

Ayotte recalled that Heed called her on Friday or Saturday about his potential resignation. Heed told her that Flynn had approached him and recommended that he resign for the good of the Attorney General’s Office. Ayotte did not recall what specific information Heed told her about the meeting with Flynn. She did recall some discussion about Heed dancing with his shirt off and the existence of photographs. She received the impression that Heed did not feel that it was going to amount to a criminal charge, but that it would be difficult for him to defend himself against the allegations, given his position as Attorney General. She did not recall Heed having mentioned that the investigation might be slowed down while he considered his resignation. Ayotte told Heed that she would support whatever decision he made, and she recommended that he do whatever he felt was right for him and his family.

At some point after she spoke to Heed, Ayotte received a phone call from Flynn, who advised her that Benson wanted Heed to resign. Flynn focused his concerns on how

the allegations would harm the Attorney General's office. Benson also contacted Ayotte over the weekend to advise her that Heed might resign. She did not discuss with Benson any of the specific allegations made about Heed's conduct.

According to Heed, he called Flynn on Monday and told him that he was leaning towards resignation. Flynn encouraged him to resign and mentioned that "you don't want to become a Vetter." Flynn encouraged Heed to reach his conclusion quickly and stated that he was "trying to hold things off but he couldn't hold it off forever." According to Flynn, Heed called him on Tuesday morning and told him that he had started to draft a letter of resignation, but he was unsure if he was going to finish it. Flynn responded that it was entirely up to him.

Ayotte spent Monday, June 14th and Tuesday, June 15th in jury selection for a first degree murder trial in Nashua. On Tuesday, Heed asked her to leave jury selection and return to the office. Upon her return, Heed announced his decision to resign. He also told her that he recommended to Benson that Benson appoint her as the next Attorney General. Around this time, she also received a phone call from Benson advising her that he intended to nominate her to be the next Attorney General.

H. Resumption of Investigative Efforts

Later that day, Ayotte called Hathaway to advise him that Heed had submitted a letter of resignation. She had attended an afternoon press conference with Benson, and the press had inundated Benson with questions about the investigation of Heed. Ayotte wanted to advise Hathaway about potential press inquiries. According to Hathaway, he told Ayotte that the investigation had been shut down, in response to which she expressed great surprise. She told Hathaway that she would get the investigation back on track. Hathaway told her that he intended to address Flynn's actions after the investigation ended.

Ayotte contacted Flynn on Wednesday morning, June 16th. She told him that she was calling at Hathaway's request, and she advised him that the investigation needed to be completed quickly for the sake of Heed and the Attorney General's Office. Flynn expressed concern for Heed and his family, to which Ayotte responded that the investigation had to be completed for Heed's sake and for the sake of the Attorney General's office. Without argument, Flynn agreed to comply with her request. Flynn never discussed concerns about the expenditure of resources with Ayotte.

Also on Wednesday morning, Booth spoke to Flynn at approximately 7:30 a.m., as usual. It is unclear if this conversation occurred before or after Flynn spoke to Ayotte. Booth again spoke to Flynn about completing interviews of the principle witnesses. Flynn "hemmed and hawed," at which point Booth stood up to leave and re-stated his position. Flynn then looked up at Booth and stated "Do what you think is right." Booth replied that he would complete interviews of the principle witnesses.

Ayotte reported back to Hathaway about her discussion with Flynn. Hathaway then called Booth to advise state police to resume interviews, although Booth already knew that further investigation would occur, based on his 7:30 a.m. discussion with Flynn.

According to Lt. Kelley, even if he had never received any orders to "hold off" on going to Keene, he does not necessarily believe that the investigation would have progressed any faster than it did. In that regard, the delay had minimal impact on his work.

I. The Interview of Peter Heed

On Friday, June 18th, Hathaway spoke to Heed about being interviewed, and on Saturday, June 19th, he spoke to Heed's counsel, Ken Brown. Hathaway told Brown that the investigation had been briefly shut down and that there had been confidentiality problems with leaks from the investigation. Hathaway asked Brown if he knew about the Johnson's Dairy Bar meeting, and Brown indicated that he would speak to his client about it. On Monday, June 21st, Brown spoke to Hathaway and indicated his knowledge that Flynn had asked for Heed's resignation.

On Tuesday afternoon, June 22nd, Lt. Kelley interviewed Heed. Prior to the interview, Lt. Kelley learned that some boundaries were going to be placed on the subject matters to be covered during the interview. Lt. Kelley and Hathaway created a list of subject matters to be discussed during the interview, and that list was reviewed with, and approved by, Heed and his counsel. Lt. Kelley then completed a recorded, 80-minute interview of Heed.

After the interview, Hathaway and Brown spoke in private. According to Hathaway, he expressed to Brown that he was "deeply, deeply disappointed," and that there were issues about the investigation that he intended to address once his report was completed. Hathaway was deeply conflicted about what he should do, and he decided not to take any immediate action in order to ensure completion of a professional investigation "without playing politics with his report." Brown told Hathaway that Heed planned to ask the Executive Council to "hold off" voting on acceptance of his letter of resignation. After the private meeting with Brown, Hathaway briefly addressed Heed, and he remembered Heed stating that "he had fully believed it was a lot worse than this." Hathaway did not discuss with Heed what had led him to that belief.

According to Heed, after this interview, Hathaway told Heed that he had spent a great deal of time tracking down dead ends and side issues. Hathaway told him that they had confirmed that Heed was not intoxicated at the conference; they had tracked down the "knock-on-the-door" incident and the "yelling in the hallway," and they had eliminated the alleged conspiracy to cover-up the photographs. Heed was also told in a general way that issues regarding other women had been tracked down and resolved. While Hathaway did not tell Heed about the outcome of the investigation, the nature of the questions and comments led Heed "to at least have some confidence that it was going

to be some sort of a positive outcome." For his part, Lt. Kelley had no recollection of specific discussions in which Heed was told that side issues had been resolved.

Also on June 22nd, Heed sent a letter to the Executive Council asking them to table consideration of his letter of resignation. The letter stated that "when the allegations first arose, rumor and innuendo suggested that I could not effectively continue to serve as the State's highest law enforcement officer. As the facts slowly unveil themselves, I now question whether it was in the best interest of the State of New Hampshire and Office of the Attorney General for me to have resigned." In this letter, Heed raised no concerns about the investigative process or his concerns about Flynn's representations made during their meeting to discuss his resignation. Heed had considered withdrawing his letter of resignation, rather than asking for the letter to be tabled, but he felt that it would be inappropriate before Hathaway finished his report. He also recognized that "if we would lose that battle, we weren't going to win any other battles."

J. The Executive Council Meeting

The Executive Council met on Wednesday, June 23rd and considered Heed's letter of resignation. Two days beforehand, on Monday, June 21st, Flynn spoke to Booth early in the morning and said that Flynn was on call to appear at the Governor and Council meeting. Flynn asked for a document that could brief him on the investigation. Booth believed that Flynn wanted the document for his own review, and Flynn never stated to Booth that he planned to give the document to the Executive Council. Hunter did not recall if Booth discussed the second internal memorandum with him, nor did he recall discussing it with Lt. Kelley or Flynn.

Benson recalled asking Flynn to attend the Executive Council meeting and to "bring whatever he had" with him. Flynn remembered that Benson asked him to bring information to the Executive Council in case the Council needed it when considering Heed's resignation. Flynn recalled asking for reports to read, in case he was queried by Governor and Council.

According to Lt. Kelley, Booth paged him while he was driving to Littleton for an interview. Lt. Kelley contacted Booth, and Booth inquired about police reports related to the Heed investigation. Lt. Kelley advised Booth that he had not yet drafted police reports because he had been fully occupied with conducting interviews. Booth then requested a synopsis of the interviews completed to date. Booth indicated that Flynn might have to speak to the Executive Council on Wednesday, and in order to speak intelligently, he needed to be "brought up to speed on the case." Lt. Kelley proposed that he prepare another internal memorandum. Booth asked if Lt. Kelley could complete the memorandum by the following day, and Lt. Kelley responded affirmatively. According to Lt. Kelley, he questioned Booth about "where do I stand with Marc Hathaway with this," and Booth answered "Well, he doesn't really have to know about it right now." Booth recalled receiving general instructions from Flynn that the memo was not to be shared, but he did not recall whether Flynn specifically instructed him not to share the

memorandum with Hathaway. Flynn had no recollection of asking for a memo to be prepared without Hathaway's knowledge, and he could not have imagined doing that.

Lt. Kelley began drafting the memorandum that evening at 8:00 p.m. after his son's 8th grade graduation. He decided to call Hathaway to advise him about the request for a second memorandum. He told Hathaway that the memorandum had been requested to bring Flynn up to speed on the investigation in anticipation of an Executive Council meeting. Lt. Kelley informed Hathaway that Hathaway did not have to know about the preparation of the memorandum. Hathaway recalled that Lt. Kelley advised him that he had received instructions from Booth to prepare a second internal memorandum for the purpose of briefing the Executive Council. According to Hathaway, Lt. Kelley told him about his instructions that "he should not tell Hathaway about the existence of the memorandum." Hathaway did not ask for a copy of the memo based on concerns that Lt. Kelley might get in trouble for discussing the matter with Hathaway.

This 20-page second memorandum summarized all interviews that had been completed to date. Lt. Kelley completed the memorandum at 3:00 a.m. on Tuesday, June 22nd, and he hand-delivered it to Flynn at 6:30 a.m. Lt. Kelley did not discuss the memorandum with Flynn when he delivered it to him. Flynn stated that he never read the memo before the Executive Council meeting on Wednesday. Flynn stated that he never provided a copy to the Executive Councilors.

Prior to the Executive Council meeting, none of the Executive Councilors were lobbied by either Benson or Flynn to influence their votes on Heed's letter of resignation. Councilor David Wheeler contacted Flynn to ask him if the rumors about Peter Heed dirty dancing and grinding on the dance floor were true, and Flynn told Wheeler that they were true. Wheeler's focus was on Heed's inappropriate behavior, and he was not focused on the outcome or status of the criminal investigation. Councilors Raymond Burton and Raymond Wieczorek had phone discussions with Flynn about Peter Heed. Both recalled that the discussions were limited and general in nature, and neither Councilor received any substantive information about the criminal investigation from Flynn. Councilors Peter Spaulding and Ruth Griffin did not speak to Flynn about the investigation of Peter Heed.

On Wednesday, June 23rd, Flynn attended the Governor and Council breakfast meeting at the Administrative Offices of the Court. The Executive Council holds a breakfast meeting before every Executive Council meeting, and it is often hosted by different state agencies. Flynn arrived carrying Lt. Kelley's second memo in a folder under his arm. Spaulding remembered asking Flynn what he was doing there because it was unusual for Flynn to attend Executive Council meetings. Flynn responded that the Governor had requested that he attend to answer any questions that anybody had. After the breakfast, the Executive Council went into a nonpublic session. Flynn did not attend the nonpublic session. Following the nonpublic session, Burton saw Flynn nod to Benson, who waved Flynn aside. This exchange suggested to Burton that there was no need for Flynn to reveal the contents of Flynn's envelope. Benson stated that he received a copy of the 20-page memo from Flynn after the Executive Council meeting, but he

never opened the envelope or read the memo upon receipt. Flynn had no recollection of providing a copy of the memo to Benson.

After the breakfast meeting, the Governor and Executive Council met at the State House. Hathaway attended the meeting at the State House to address the Executive Councilors if requested, and to advise them that his investigation had not been completed. The Executive Council voted to accept Heed's letter of resignation by a vote of 3-2. On July 14, 2004, County Attorney Hathaway submitted his report finding that Peter Heed did not commit any crimes at the Mount Washington conference.

III. ANALYSIS OF CRIMINAL LAWS

Many of New Hampshire's criminal laws address the professional conduct of executive branch officials. The New Hampshire Criminal Code does not impose criminal sanctions on all violations of official duty. Rather, the Code focuses on the character of the misconduct to identify what official malfeasance should warrant criminal liability. Other forms of misbehavior are intended to be dealt with outside of the Criminal Code.

I have analyzed all of the pertinent criminal statutes to determine whether Flynn or Benson violated any criminal laws during the investigation of Heed. I do not recommend initiating any prosecution for a violation of criminal law. My analysis is necessarily guided by my ethical obligation to refrain from bringing criminal charges unless there is a good faith basis to believe that I could prove each element of the offense beyond a reasonable doubt.

1. **Improper Influence - RSA 640:3**

A person is guilty of a Class B felony if he:

- (a) Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion; or
 - (b) Privately addresses to any public servant who has or will have official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law.
 - (c) Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of subparagraph (a) or (b) hereof.
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This offense is designed to complement the crime of bribery. While bribery proscribes the offer of a benefit to a public servant for the purpose of influencing an official action, this law criminalizes the use of threats against public servants with the same illicit objective. See Model Penal Code § 240.2 comment 1 at 49.

Subparagraph (a) - No Threats of Harm

This investigation has not uncovered any evidence suggesting that Flynn or Benson threatened to harm Heed if he did not resign, nor has Heed alleged that either Flynn or Benson engaged in such conduct. Indeed, if Flynn or Benson had attempted to exert improper influence over Heed by threatening him, subparagraph (c) of this law would have required Heed to report such conduct to law enforcement. Heed has not made any report of conduct that was designed to influence him in violation of this statute.

In his letter to the Attorney General addressing Hathaway's report, Heed questioned whether Flynn had exerted improper influence over Hathaway or State Police

investigators in connection with the criminal investigation. Neither Hathaway nor State Police investigators have stated that Flynn or Benson threatened them with harm in connection with their handling of the investigation. Our investigation did not reveal any evidence that any such threats were made. Therefore, subparagraph (a) provides no basis for the imposition of criminal liability.

Subparagraph (b) – Private Discussions To Purposely Influence Official Discretion in Judicial or Administrative Proceedings

Under subparagraph (b), improper influence occurs if a person engages in private discussions with a public servant who will exercise discretion in a judicial or administrative proceeding, with a purpose to influence that official's discretion on the basis of considerations other than those authorized by law.

No judicial or administrative proceedings took place in connection with this investigation, thus, by its plain language, the statutory provision would not apply. Nevertheless, I considered whether Hathaway, as a prosecutor who had discretion to initiate criminal charges that would be handled in court, might constitute a "public servant who will exercise discretion in a judicial proceeding." If so, I needed to consider whether Flynn's private discussions with Hathaway might constitute improper influence. I found no legal authority and insufficient evidence to support this theory of criminal liability.

The New Hampshire Supreme Court has never construed RSA 640:3(b), but the law is adopted verbatim from the Model Penal Code. See Model Penal Code § 240.2 comment 3 at 55. Commentary from the Model Code indicates that the provision was designed to prohibit *ex parte* communications addressed to public servants who will exercise discretion in a judicial or administrative proceeding. According to the commentary of the Model Code, this section does not reach attempts to influence ordinary executive officials in their exercise of discretion or performance of duties. See id. Indeed, there would be strong policy considerations against discouraging private discussions between prosecutors and law enforcement officers regarding criminal charging decisions, such as occurred here. Based on this commentary, it is clear that the law is meant to address those who act as objective decision makers in an adjudicative proceeding.

2. Obstructing Government Administration – RSA 642:1

A person is guilty of a misdemeanor if that person uses intimidation, actual or threatened force or violence, . . . or engages in any other unlawful conduct with a purpose to hinder or interfere with a public servant performing or purporting to perform an official function, or to retaliate for the performance or purported performance of such a function.

This law does not punish all acts that obstruct a government function; rather, it is limited in application to the use of intimidation, actual or threatened force or violence, or other conduct that is unlawful independent of a purpose to obstruct the government. See State v. Diamond, 146 N.H. 691, 695-696 (2001). The offense also requires proof beyond a reasonable doubt that the actor had a conscious object to hinder or interfere with a public servant's performance or purported performance of an official function.

a. *The Official Functions of County Attorney Hathaway and State Police.*

Flynn directed the division of state police to temporarily suspend or hold off on conducting interviews during the criminal investigation. At the time of Flynn's actions, Hathaway, Booth and Lt. Kelley were "public servants" performing the "official function" of supervising or conducting the criminal investigation of Heed. Under this law, it is irrelevant that the state police largely ignored the Commissioner's instructions to discontinue interviews, provided that the statutory prerequisites and purposeful mental state can be satisfied.

There is no evidence that Flynn exhibited intimidation, actual or threatened force or violence towards anyone. To the contrary, Hathaway described his interaction with Flynn as professional and cordial. Despite their disagreement, Hathaway colorfully characterized their respective politeness as if "we were pouring warm milk over one another." Flynn likewise did not intimidate or threaten state police personnel.

To establish criminal liability under the second clause of the statute, Flynn's order would have to constitute "other unlawful conduct" under the statute. The New Hampshire Supreme Court has discussed an important limitation on the reach of the phrase "other unlawful conduct" under this statute. See Diamond, 146 N.H. at 695-696. The limitation requires that the conduct at issue must be unlawful for some reason other than the actor's intent to obstruct a government function. See id. (discussing *Model Penal Code* §242.1 comment 5 at 206-07). The State must demonstrate that the conduct violated a separate provision of New Hampshire law or administrative regulation.

There is insufficient evidence that Flynn's conduct in suspending the investigation violated a separate provision of New Hampshire law or administrative regulation. As Commissioner of the Department of Safety, Flynn had statutory authority to curtail

investigative efforts. His duties encompass the management of all operations of the division of state police and the exercise of executive direction over their investigations. See RSA 21-G:9 (outlining powers and duties of commissioners generally); RSA 21-P:2 (codifying general functions of commissioner of department of safety); RSA 21-P:7 and 106-B:2 (establishing division of state police under commissioner). In short, whether reasonable or unreasonable, his decision to suspend investigative efforts fell within his delegated authority. I cannot conclude that Flynn's non-responsiveness to Hathaway's directive to continue the investigation rendered Flynn's discretionary actions unlawful, particularly where Flynn promptly obeyed Ayotte's instructions to re-commence the investigation.

I also considered whether the Commissioner's conduct might constitute "other unlawful conduct" if his conduct breached the executive branch code of ethics. This code of ethics is discussed in detail in Section IV. of this report. The code is an executive order, see Executive Order 98-1 and 2003-2, and it does not become effective as a law until January 1, 2005. See SB 312-FN (2004 session). There is no authority in New Hampshire suggesting that breach of an executive order would constitute "other unlawful conduct" under this statute. Therefore, any breach of the code of ethics in June 2004 would not constitute "other unlawful conduct" independent of a purpose to obstruct government administration.

Case law suggests that a violation of a legal duty may qualify as "unlawful conduct" under this statute. See Diamond, 146 N.H. at 695-96. I also considered whether Flynn engaged in "other unlawful conduct" by committing an unlawful tort. In general, tort liability flows from the breach of a lawful duty owed to another, which causes private damages. Flynn holds various statutory duties, including the enforcement of the criminal law. See RSA 21-P:2, II. (a). For the purposes of this discussion, it is sufficient to note briefly that any inquiry into Flynn's potential violation of a legal duty under governmental tort law involves a detailed analysis of Flynn's performance of discretionary functions as a public official, the proper scope of his official duties, and the legal doctrine of official immunity. Here, all of these considerations militate against proving criminal liability beyond a reasonable doubt based on tort liability.

b. The Official Functions of Heed.

Flynn's solicitation of Heed's resignation did not occur when Heed was performing or purporting to perform any "official function" as Attorney General. See State v. Briggs, 147 N.H. 431, 436 (2002) (discussing whether police officer was performing an official function at the time the defendant interfered with the police officer). Nor can any reasonable inference be drawn that Flynn had a conscious object to interfere with the performance of an official function when Heed and Flynn met at Johnson's Dairy Bar. To the contrary, Flynn was encouraging Heed to resign from office, which would result in his never performing another official function as Attorney General. Flynn delivered a message to Heed that Benson wanted him to resign. That personal contact is not criminally sanctioned as an obstruction of government administration.

c. *Retaliation for Performance of Official Function.*

During the investigation, Heed commented that Benson was dissatisfied with Heed's handling of the Linda Pepin investigation and other official matters, such as Heed's handling of Right-To-Know requests, thus suggesting that Benson's decision to ask him to resign was a retaliatory move. Benson rejected any suggestion that he considered Heed's past performance in office when encouraging Heed's resignation based on the Mount Washington Hotel incident. Benson also stated that he personally liked Peter Heed and acknowledged Heed's accomplishments in office. To highlight his perception of their personal bond and productive working relationship before the Mount Washington incident, Benson noted that he joined Heed for a day of canoeing within weeks before the investigation of Heed.

I investigated whether Benson committed any unlawful conduct with a purpose to retaliate for Heed's past performance in office. Although it is certainly possible that Benson's perception of the seriousness of the situation could have been influenced by Heed's past actions in office, there is no direct evidence that he was so influenced. Heed acknowledged that Benson did not raise any concerns about his past official performance in office when Benson discussed his resignation. There is no evidence that Benson made any public or private statements in this regard. Benson's public statements were supportive of Heed's work in office, but critical of his alleged behavior. During private discussions with Benson about Heed's resignation, Flynn did not recall Benson having discussed Heed's past performance in office. When Benson spoke to Commissioner Stephen after the allegations arose, Stephen recalled that Benson highlighted the need for public officials to comport themselves appropriately at all times, but made no mention of any dissatisfaction with Heed's official conduct. Likewise, there is no evidence that Benson engaged in any unlawful conduct to encourage Heed's resignation. The State simply could not meet its burden of proving any suggestion of a retaliatory motive.

3. **Official Oppression – RSA 643:1**

A public servant is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or he knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

This law prohibits a public servant from knowingly committing an unauthorized act which purports to be an act of his office, if the unauthorized act is undertaken with the conscious object to benefit oneself or another or to harm another. The statute encompasses two *mens rea* requirements. The State must not only prove beyond a reasonable doubt that the public servant knew that he or she was committing an unauthorized act which purported to be an official act, but also must show that the public

servant did so with the purpose to derive personal benefit, to benefit another or to harm another.

a. Meeting Regarding Heed's Resignation

There is no evidence that when Flynn asked Heed to resign, he was engaged in an act "which purported to be an act of his office." Rather, the circumstances indicate that he met with Heed outside of his official duties, at the request of Benson. Both Heed and Flynn stated that Flynn began their meeting by saying "don't shoot the messenger." Flynn also told Heed that he was just passing along a message from the Governor. Given these facts, it would be difficult for anyone to infer that Flynn was purporting to act in his official capacity as the executive administrator of the Department of Safety when he sought Heed's resignation. In that capacity, Flynn would have no authority over Heed – they are both nominated and confirmed by the Governor and Council. Moreover, as Attorney General, Heed would have been well aware that Flynn had no authority or power over Heed's status as Attorney General. Further, even if it could be shown that Flynn was purporting to act in his official capacity, the State could not prove that his actions were unauthorized as required by statute because Benson authorized Flynn to speak to Heed on his behalf.

I also considered whether Flynn, during the meeting at the Johnson's Dairy Bar, knowingly committed an unauthorized act purporting to be an act of his office by disclosing to Heed the general information about Heed's alleged misconduct. Heed claims that Flynn attributed his knowledge of these allegations to "reports that came across his desk." Flynn claims that he only spoke in general terms and classified the allegations as "rumors" and "talk" about the Attorney General, which he had learned about even before the state police investigation had commenced. However, he acknowledged telling Heed that "I've seen the notes," which one could reasonably infer to be a reference to the criminal investigation. Flynn also denied having read more than one or two pages of Lt. Kelley's internal memorandum on the Friday morning before he spoke to Heed. The weight of the evidence supports an inference that Flynn obtained at least portions of information from the oral debriefings he received from Booth and Lt. Kelley regarding the Reid interview, irrespective of whether Flynn had read the memo or heard similar rumors beforehand.

There is no definition of the term "unauthorized act" under the statute, and the New Hampshire Supreme Court has not been asked to construe the term. It does not appear to apply broadly to any act for which a person has not received specific authorization. Rather, other jurisdictions with analogous statutes have construed this language more narrowly to prohibit the "unauthorized exercise of [official] functions," see People v. Feerick, 93 N.Y.2d 433, 448, 714 N.E.2d 851, 857, 692 N.Y.S.2d 638, 645 (1999), or to prohibit acts falling outside of the scope of "the duties inherent in the nature of the office." State v. Allison, 692 A.2d 936, 939 (Me. 1997). In this regard, there is no statute, administrative regulation or policy at the Department of Safety that would prohibit the Commissioner from disclosing the nature of the allegations underlying a criminal investigation, or render any such disclosure as outside the duties of the

Commissioner. Although it may have been unwise, and was contrary to the interests of the investigation to disclose any information to Heed, the State could not prove beyond a reasonable doubt that, in doing so, Flynn knowingly committed an unauthorized act purporting to be an act of his office.

Flynn also has a questionable statutory defense under RSA 627:2, II. to any claim that his disclosure of information to Heed was an unauthorized act, which defense the State would be required to disprove beyond a reasonable doubt. Flynn would argue that his statements to Heed were legally justified because Benson asked Flynn to speak to Heed about his resignation, and Flynn had a duty to assist the Governor. Flynn reports directly to Benson. See RSA 21-G:9. RSA 627:2 states in relevant part:

- I. Any conduct. . .is justifiable when it is authorized by law, including laws defining functions of public servants or the assistance to be rendered to public servants in the performance of their duties. . .
- II. The justification afforded by this section to public servants is not precluded . . .as to persons assisting public servants, by the fact that the public servant exceeded his legal authority. . ., provided that the actor believed the public servant to be engaged in the performance of his duties.

The New Hampshire Supreme Court has not interpreted this defense of justification. The State would argue that the defense has no application because it applies narrowly to those specific instances where the law places an affirmative duty on a person to assist a public servant. However, Flynn would argue that because his act of asking Heed to resign was done to assist Benson – a public servant – it was legally justified, regardless of whether or not Benson was acting outside of the scope of his authority when he asked Flynn to help him seek Heed's resignation.

In order to prove an offense under this statute, the State would also have to prove that Flynn sought Heed's resignation with the requisite purposeful mental state –to "benefit" himself or another or to "harm" another. RSA 643:1 provides no definition of the term "benefit," nor has the New Hampshire Supreme Court had an opportunity to construe the term "benefit" under this statute. It is a more general term than "pecuniary benefit," which is specifically defined under RSA 640:2 to mean any advantage the primary significance of which is economic gain. The Model Penal Code broadly defines "benefit" to mean "gain or advantage" - including benefit to "any person in whose welfare he is interested." See Model Penal Code § 240.0(1). However, the New Hampshire Legislature did not adopt that definition. At least 18 jurisdictions have official oppression or official misconduct statutes comparable to New Hampshire, which require proof of intent to benefit. Although none are authoritative in New Hampshire courts, the reported cases from those jurisdictions do not limit the term to pecuniary advantage or "corrupt" purposes. See People v. Feerick, 93 N.Y.2d 433, 447, 714 N.E.2d 851, 856, 692 N.Y.S.2d 638, 644-45 (1999) (collecting cases defining the term "benefit" in other jurisdictions with analogous statutes). In some of those jurisdictions, however, "benefit" is a statutorily defined term. Some courts have held that "benefit" includes

“more than financial gain and can encompass political or other types of advantage.” See id. A minority of jurisdictions require proof of monetary gain. See id. Overall, the weight of authority would support a broad interpretation of the term “benefit” under this statute, but there is no controlling New Hampshire precedent offering definitive guidance. With respect to the term “harm,” it is defined broadly in another criminal statute as “any disadvantage or injury, pecuniary or otherwise.” See RSA 640:3. II.

Regarding Flynn’s intent to benefit, it is abundantly clear that Flynn received no personal benefit by seeking Heed’s resignation. Although Flynn solicited Heed’s resignation from office, which could constitute “any disadvantage or injury,” it does not necessarily follow that he acted with a purpose and conscious object to harm Heed. According to Flynn, he did not want to ask for Heed’s resignation, but he believed that Heed’s resignation was in the best interest of his career, his family and the Attorney General’s office. Flynn told Booth that he was “sick” about talking to Heed, and Booth sensed that Flynn was very upset about having to do so. Flynn spoke to Ayotte, Stephen and Hathaway about the adverse impact of the allegations on Heed, his family and the Attorney General’s Office. Hathaway stated that he did not believe that Flynn was seeking to either help or harm Heed; rather, he believed that a political judgment about his continuation in office had been made.

There is another argument that Flynn consciously sought Heed’s resignation to benefit Benson because Heed had become a political liability to Benson. Heed alleged that Flynn stated that sentiment to him in no uncertain terms. Benson also spoke to Heed about the political consequences of the allegations. However, Flynn also discussed his personal belief that Heed’s alleged actions were highly inappropriate given his position as the state’s chief law enforcement officer. From that, one could also reasonably infer that Flynn’s conscious object was to encourage Heed’s resignation, at least in part, because he simply disapproved of Heed’s behavior as attorney general. Flynn’s comments to Hathaway and Ayotte also lend support for another reasonable inference that Flynn wanted Heed to resign to spare the Attorney General’s Office from a lengthy scandal. Thus, apart from benefiting Benson politically, there are several other reasonable inferences that could be drawn about Flynn’s purpose for encouraging Heed’s resignation. While the State could make a credible argument that Flynn’s conscious object was to benefit Benson politically, it would be difficult to prove that mental state beyond a reasonable doubt, in light of the other credible reasons for Flynn’s actions. Nor is there definitive legal authority that a political benefit would necessarily qualify under the statute. Even assuming that the State could prove beyond a reasonable doubt that Flynn consciously acted to benefit Benson politically, the State still could not prove the other critical elements required under the statute – that Flynn committed an unauthorized act and was purportedly performing an official function when he encouraged Heed to resign.

b. Suspension of Investigation

The law also penalizes a public servant who knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office, if done for the purpose of benefiting himself or another or harming another. The evidence does not support a claim that Flynn knowingly refrained from performing a duty imposed on him by law based on the delay in investigative efforts. As the Commissioner of Safety, Flynn had authority to decide how to allocate the agency's resources to best fulfill its function. A decision to curtail certain activities in order to avoid overtime costs is clearly within his discretion. Likewise, efforts to clarify the scope of a particular investigation and to limit investigative efforts until that clarification is obtained, is not outside of the scope of his authority.

Further, although there is a reasonable inference that Flynn's actions in slowing the investigation were in furtherance of his attempt to persuade Heed to resign, there is an equally strong inference that he was motivated by financial concerns for the agency. There is no dispute that Flynn also repeatedly discussed his concerns about the allocation of resources and scope of the investigation, as well as the fact that the victim had no interest in pursuing a charge. All of those are factors that a law enforcement officer might consider in determining whether, and how far, to investigate. While one could question the wisdom of attempting to curtail the investigation of such a high-ranking official under the circumstances, the State could not prove beyond a reasonable doubt that those reasons did not influence Flynn's conduct. Moreover, once Ayotte intervened at Hathaway's request, Flynn immediately allowed the investigation to continue. This fact would also undermine the State's ability to prove beyond a reasonable doubt that Flynn refrained from performing a duty imposed on him by law or clearly inherent in the nature of his office.

4. Misuse of Information - RSA 643:2

A public servant is guilty of a misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, he:

- I. acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such action or information; or
 - II. speculates or wagers on the basis of such action or information; or
 - III. knowingly aids another to do any of the foregoing.
-

The New Hampshire Supreme Court has stated that by enactment of this provision the legislature created a duty for public servants not to misuse information, and the purpose of the provision is to prevent government officials from using "inside" information for their own personal gain. See *Evans v. Hall*, 118 N.H. 920 (1978). As

such, it creates a statutory conflict of interest provision enforceable either civilly or criminally. See id. at 921. “[Government] officials may not abuse their office by using information gained in their official capacities for their own personal benefit. . .” Id.; see also 13 LOUGHLIN, NEW HAMPSHIRE PRACTICE, Local Government Law § 619 at 480 (1995).

RSA 643:2 does not define the term “pecuniary interest.” However, the Model Penal Code, on which it is based, provides that the term should be interpreted by analogy to the defined term “pecuniary benefit” in the Criminal Code. See Model Penal Code § 243.2 comment 3 at 306. It would include, therefore, any interest the primary significance of which is economic gain. See RSA 640:2, II. (c) (“pecuniary benefit” means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally).

There is no evidence to support a charge that Flynn used or relied on inside information from the investigation of Heed for his own economic gain. It is readily apparent that Flynn acquired no pecuniary interest at all as a result of Heed’s investigation or resignation. Although Flynn received briefings and memos about the investigation of Heed by virtue of his office, he did not rely on that information to acquire or divest himself of any pecuniary interest in any property, transaction or enterprise.

The law also prohibits a public servant from aiding another to engage in any of the acts forbidden by the statute. “The prohibition is premised on the view that the dangers to effective government posed by the [illegal] conduct. . . are equally presented by the public official who aids someone in the private sector to act on the basis of inside information.” See Model Penal Code § 243.2 comment 5 at 307. Flynn aided Benson by encouraging Heed’s resignation. However, similar to Flynn, Benson did not acquire or divest himself of a pecuniary interest in any property, transaction or enterprise in connection with Heed’s resignation. There is no factual support for a criminal charge against either Flynn or Benson under this statute.

5. Hindering Apprehension or Prosecution - RSA 642:3

A person is guilty of an offense if, with a purpose to hinder, prevent, or delay the discovery, apprehension, prosecution, conviction or punishment of another for the commission of a crime, he:

....

- (e) Obstructs by force, intimidation or deception anyone from performing an act which might aid in the discovery, apprehension, prosecution or conviction of such person.
-

This statute’s application to the investigation of Heed is tenuous at best. The law applies to purposeful efforts to hinder the discovery, apprehension, prosecution, conviction or punishment of another for the commission of a crime. There is no evidence

suggesting that Flynn acted with a purpose to hinder or delay the discovery, apprehension, prosecution or conviction of another person for a crime. The only person under criminal investigation was Heed, and even Heed has not alleged that that Flynn purposely acted to hinder, prevent or delay Heed's discovery, apprehension, prosecution, conviction or punishment.

6. Tampering With Public Records or Information - RSA 641:7, III.

A person is guilty of a misdemeanor if he, among other things, purposely and unlawfully destroys, conceals, removes or otherwise impairs the veracity or availability of any thing belonging to, received or kept by the government for information or record.

This law proscribes tampering with a government record. It applies to "things" belonging to, received or kept by the government for information or record. There are no allegations in this case that Flynn or Benson destroyed, concealed, removed or impaired the veracity of any "thing" belonging to, received or kept by the government for information or record. The law is simply inapplicable to the facts of this case.

In his letter to the Attorney General, Heed suggested that Flynn tampered with public "information" when Flynn temporarily suspended the investigation. Those allegations do not implicate this criminal statute, which, as evidenced by the plain language of the statute, is designed to address only public records and other tangible items. See generally Annotation, *What Constitutes A Public Record Or Document Within Statute Making Falsification, Forgery, Mutilation, Removal, Or Other Misuse Thereof An Offense*, 75 A.L.R. 4th 1067 (2004); *Model Penal Code* § 241.8 comment 1 at 183.

7. Tampering With Witnesses and Informants (RSA 641:5)

A person is guilty of a Class B felony if, believing that an investigation is pending, he or she attempts to induce or otherwise cause a person to:

- (a) testify or inform falsely;**
 - (b) withhold any testimony, information document or thing;**
 - (c) elude legal process summoning him to provide evidence; or**
 - (d) absent himself from any investigation to which he has been summoned.**
-

Paragraph (a) prohibits attempts to induce a person to provide false information, while paragraph (b) proscribes efforts to cause a person to withhold cooperation. Heed does not allege that either Benson or Flynn induced him to provide false information, or encouraged him to withhold his cooperation with the criminal investigation, nor is there any independent evidence of such an occurrence. No criminal violation occurred under these paragraphs.

Paragraphs (c) and (d) are aimed at sanctioning interference with a legal summons. Paragraph (c) prohibits efforts to induce a witness to elude legal process summoning him to provide evidence, and paragraph (d) criminalizes efforts to cause a witness to absent himself after receipt of a summons. Because Heed was not summoned in connection with the criminal investigation, these paragraphs do not apply.

In his letter to the Attorney General, Heed asked the Attorney General to consider whether Flynn or Benson may have tampered with him as a witness by disclosing to him only portions of the criminal investigation in order to encourage him to resign. Those actions would not constitute witness tampering, unless Flynn or Benson attempted to induce or cause Heed to provide false information or withhold his cooperation with the criminal investigation. Heed does not allege that anyone attempted to induce him to lie or withhold his cooperation.

Heed also suggested that Flynn tampered with State Police investigators when the investigation came to a temporary halt. The temporary suspension did not constitute witness tampering because Flynn did not ask the investigators to testify or inform falsely, and he did not attempt to induce or cause the investigators to withhold any testimony, information, document or thing. At most, Flynn caused some delay in state police efforts to obtain information. That conduct does not constitute witness tampering.

IV. THE EXECUTIVE BRANCH CODE OF ETHICS

By executive order, executive branch public employees and public officials shall avoid conflicts of interest or the appearance of a conflict of interest. See Executive Order 98-1 and 2003-2. Public employees and public officials shall not participate in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties. The term "conflict of interest" is specifically defined in the executive order. "Conflict of interest" shall mean "a situation, circumstance, or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty." This code of ethics was promulgated to ensure that the private interests of public officials do not interfere with the proper exercise of a public duty. A State Code of Ethics, which is substantially similar to the executive order, becomes effective as a law in January 2005. See SB 312-FN (2004 Session).

Flynn did not have a "private interest" that conflicted with his public duty as Commissioner of the Department of Safety. Although he assumed "conflicting roles" when he encouraged Heed's resignation and simultaneously managed the criminal investigation, he did not have any private interest at stake in the outcome. Under the executive order, no "conflict of interest" or appearance of conflict of interest occurred. Similarly, Benson acted in an official capacity when he decided to encourage Heed's resignation, and Benson had no financial or private interest that conflicted with his role as Governor.

The executive order also prohibits executive branch officials from disclosing confidential or privileged information for personal benefit or financial gain. There is no evidence that Flynn or Benson disclosed confidential information for personal benefit or financial gain. Nor is it reasonable to infer that they used their positions to secure governmental privileges or advantages for themselves or others.

V. THE GOVERNOR'S ACCESS TO INFORMATION ABOUT CRIMINAL INVESTIGATIONS.

Hathaway raised concerns about Flynn's disclosure of confidential information to Benson. Hathaway stated "I don't believe he [Flynn] has a right to talk to his boss [Benson] about the contents of an ongoing criminal investigation." However, Hathaway also recognized that the Governor "was in a tough spot" and he "needed to know." Hathaway did not know what he would have done if Benson had contacted him directly for information during the criminal investigation, and he could not say with absolute certainty whether he would have agreed to a limited release of information, but he probably would have tried to guide him to an alternative investigation through DHHS.

Some of Hathaway's concerns arose from a Concord Monitor article dated Friday, June 18th, which reported that Benson talked about Reid's desire not to pursue criminal charges, without disclosing her name, and Benson cited Flynn as his source for the information. On that same day, DCYF employee Donna Parisi Meuse was interviewed as part of the investigation and she declined to be recorded, based in part on her fear that her statements might also be disclosed in the newspaper. In response, Hathaway had a second meeting with Flynn on that date to discuss his ongoing concerns about investigative leaks. However, he never contacted Benson because he "did not presume to tell the Governor what he could and could not say." When Flynn provided Benson with a copy of Lt. Kelley's second memorandum summarizing witness interviews, Flynn ignored instructions given by Hathaway that information from the criminal investigation should not leave the Department of Safety.

Hathaway's report raises important questions about a governor's authority to gain access to and use information about an ongoing criminal investigation by the Department of Safety or the Attorney General's Office, both executive branch agencies. Under the New Hampshire Constitution, the governor is the "supreme executive magistrate," and is "responsible for the faithful execution of the laws." N.H. Const. pt. II, art. 41. Together with the council, the governor has authority "for ordering and directing the affairs of the state, according to the laws of the land." N.H. Const. pt. II, art. 62. "The statutory powers of the governor and council are also broad and comprehensive." Barry v. King, 106 N.H. 279, 281 (1965) ("The full exercise of these broad powers demands that inquiries and investigations conducted by the Governor and Council into the activities of State departments and officials be carried on with practical efficiency"); see e.g., RSA 7:8 (power of the Attorney General to "exercise a general supervision over the state departments. . .to the end that they perform their duties according to law" is subject to "the direction of the governor and council").

The Commissioner of the Department of Safety is responsible for enforcing criminal laws, and he reports directly to the governor. See RSA 21-P:2, II.; RSA 21-G:9, I. In general, the exchange of information between commissioners and the governor is encouraged. See RSA 21-G:3, IV (“The governor should meet regularly with the heads of all agencies. Communication and exchange of information and ideas. . .between agency heads and the governor should be the goal of these meetings”).

The governor’s access to information in the exercise of his executive powers is not, however, unlimited. See Opinion of the Justices, 113 N.H. 141, 146-47 (1973). Executive power and responsibility “must be exercised within the dictates of the constitution and the lawful enactments of the legislative branch.” Id. at 148. Some legislative enactments expressly prohibit the governor from accessing certain information. See e.g., RSA 21-J:14, VI, relating to confidentiality of Department of Revenue Administration records (“No exception in paragraph IV or V shall be construed to authorize disclosure to the governor of New Hampshire or a designee or representative of the governor of New Hampshire.”). Other statutes make sensitive law enforcement records confidential and limit access to certain authorized officials. See e.g., RSA 169-B:35 (juvenile delinquency records confidential); RSA 169-C:25, III. (records relative to abuse and neglect confidential); RSA 106-H:12, 14 (certain identifying information contained in the enhanced 911 system database is confidential); N.H. Code Admin R. Saf-C 5703.04 (limiting dissemination of criminal history record information to authorized officials). There is no statute that prohibits the governor from obtaining information about an on-going criminal investigation in the exercise of his supervisory executive powers.

On the other hand, the Legislature has vested the Attorney General with the authority to supervise and conduct criminal investigations and prosecutions, see RSA 21-M:2, II. (b), and the responsibility to “enforce the laws of the state.” RSA 7:6. As part of those statutory duties, the Attorney General has the responsibility to ensure that investigations of potential criminal violations are conducted appropriately. If a governor, in the exercise of his or her executive supervisory powers, requested information about an on-going criminal investigation and compliance with that request would hamper the investigation, the Attorney General, in the exercise of his or her supervisory authority, would be required to intervene. Absent such an occurrence, however, Hathaway’s broad assertion that the Commissioner of the Department of Safety cannot share information with the Governor about an ongoing criminal investigation finds no support in the New Hampshire Constitution or statutory laws.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

APPENDIX A

BIOGRAPHY OF ASSIGNED INVESTIGATORS

Senior Investigator Paul Brodeur, New Hampshire Department of Justice

Investigator Brodeur has 40 years experience in law enforcement. Between 1964 and 1993, he was employed by the Manchester Police Department, where he received several promotions and achieved the rank of Deputy Chief of Police overseeing the Detective Division. In 1993, he joined the Attorney General's Office as a criminal investigator assigned to the New Hampshire Drug Task Force. He served as the Commissioner of the New Hampshire Department of Corrections between 1994 and 1997. Since 1997, he has served as an investigator with the New Hampshire Attorney General's Office, where he specializes in public integrity investigations, including criminal investigations of public officials. He holds a criminal justice degree from St. Anselm's College and is a graduate of the 91st Session of the FBI National Academy. He has served on numerous law enforcement boards and commissions, including the New Hampshire Police Standards and Training Council.

Deputy Chief of Police Richard O'Leary, Manchester Police Department

Deputy Chief Richard O'Leary has over 30 years experience in law enforcement. He has been employed with the Manchester Police Department since 1973. He holds a bachelor's degree in criminal justice from St. Anselm's College. Deputy Chief O'Leary has specialized in investigations and became the Deputy Chief in charge of Investigations at the Manchester Police Department in December 2002. During his career, he has supervised the Special Investigations Unit and has served as an undercover investigator with the New Hampshire Drug Task Force. He has received specialized training from the New Hampshire Police Standards and Training Council, the Federal Bureau of Investigation and the Federal Drug Enforcement Agency's Drug Commander's School at the FBI National Academy.

APPENDIX B

LIST OF INTERVIEWS COMPLETED

IN RE: INVESTIGATION OF PETER W. HEED

The following additional interviews were completed:

1. Commissioner of Safety Richard Flynn
2. Governor Craig Benson
3. Marc Hathaway, Sullivan County Attorney
4. Colonel Frederick Booth, New Hampshire State Police
5. Captain David Kelley, New Hampshire State Police
6. Richard Anderson, Assistant Sullivan County Attorney
7. Peter Heed, Former Attorney General
8. Kelly A. Ayotte, Attorney General
9. Executive Major Barry Hunter, New Hampshire State Police
10. Executive Councilor Peter Spaulding
11. Executive Councilor Raymond Burton
12. Executive Councilor Ruth Griffin
13. Executive Councilor David Wheeler
14. Executive Council Raymond Wieczorek
15. Commissioner John Stephen – DHHS
16. Mary Castelli, Esq.
17. Captain Susan Forey – New Hampshire State Police

In addition, we reviewed reports and/or summaries of the following interviews which took place prior to issuance of County Attorney Hathaway's Report dated August 18, 2004:

- A. Interviews completed by Marc Hathaway
- B. Governor Benson (8/10/04)
- C. Commissioner Flynn (8/5/04)
- D. Colonel Frederick Booth (8/5/04)
- E. Peter Heed (7/23/04)
- F. B. New Hampshire State Police Interviews
- G. See Attached Index of Interviews Reviewed



**New Hampshire State Police
Major Crime Unit**

**ATTORNEY GENERAL PETER HEED
INVESTIGATOR**

Case # MC-04-5764

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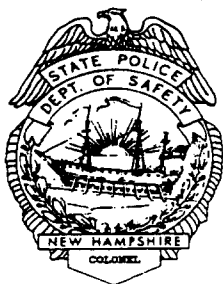
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199	Assistant County Attorney ASHLIE HOOPER Interview	6/28/04	Lt. David W. Kelley
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**New Hampshire State Police
Major Crime Unit**

**ATTORNEY GENERAL PETER HEED
INVESTIGATOR**

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